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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1939

RUDOLPH C. VARA, ET AL

v.

CITY OF HOUSTON, ET AL

On Appeal From The Court Of Civil Appeals For The Fourteenth Judicial District of Texas

MOTION TO DISMISS APPEAL

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MOTION OF APPELLEE TO DISMISS APPEAL

Defendant moves that the Appeal herein taken be dismissed on the grounds that it does not present a federal question that was raised in a timely manner, that there are adequate non-federal grounds for the decision, and that it does not present a substantial federal question.

This is an Appeal from a decision of the Court of Civil Appeals for the Fourteenth Judicial District of Texas which affirmed a Trial Court refusal to grant a writ of mandamus. The Trial Court refused to order the City of Houston to hold an election on the question of adopting

an initiative ordinance under the provisions of Article VIIb of the Charter of the City of Houston. The ordinance, if enacted, would have purportedly disannexed a portion of the City of Houston. The Trial Court held that a writ of mandamus would not issue because under the provisions of Section 10 of Article 970a and Article 1175, TEX. REV. CIV. STAT. ANN. (hereafter "Article 970a" and "Article 1175") the subject matter of the ordinance was not subject to the initiative process.

The Court of Civil Appeals affirmed the Trial Court judgment and the Supreme Court of Texas refused Appellants' application for writ of error with the notation "writ refused, no reversible error." TEX. R. CIV. P. 483.

THE QUESTION NOW RAISED WAS NOT CONSIDERED BY THE COURT BELOW

Appellants' Jurisdictional Statement raises a federal question that was not urged in the Motion for Reconsideration before the Texas Supreme Court.

The authority of this Court to hear this Appeal arises under 28 U.S.C. 1257, which in its relevant part provides:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The question presented in the Court of Civil Appeals and impliedly ruled upon by the Texas Supreme Court

is no longer being raised. A new question not raised or decided by the Texas Supreme Court, is now before this Court. Under the literal language of 28 U.S.C. 1257 no appellate jurisdiction exists to hear this new question because there has been no decision "in favor of" the validity of a statute on the grounds now urged by Appellants. The Appellants do not ask for review of the decision of the Texas Supreme Court on their Motion for Reconsideration but ask instead for a review of a question not brought before that Court. And because this new question is the sole question raised, this Appeal should be dismissed. *Cardinale v. Louisiana,* 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969). The Court below must pass on the question before this Court may do so. *Safeway Stores, Inc. v. Oklahoma Retail Grocer's Asso.,* 360 U.S. 334, 79 S.Ct. 1196, 3 L.Ed.2d 1280, (1959). *State Farm Mut. Automobile Ins. Co. v. Duel,* 324 U.S. 154, 65 S.Ct. 573, 89 L.Ed. 812, (1945); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 60 S.Ct. 670, 84 L.Ed.2d 849 (1940).

Appellants' failure to raise this question below in the Texas Courts denied those courts any opportunity to consider or act on the Appellants' new First Amendment constitutional challenge. As a consequence, the record is devoid of any evidence on the point, there was no opportunity for any constitutionally valid interpretation of the statute by any Texas Court nor was there an active search for an adequate state ground which avoids the constitutional question. *Cardinale v. Louisiana, supra.* These practical, policy reasons justify the dismissal of the Appeal, in addition to the literal failure of Appellants to comply with the requirements of 28 U.S.C. 1257.

APPELLANTS HAVE FAILED TO RAISE A FEDERAL QUESTION IN A TIMELY MANNER

At the time of the Motion for Reconsideration, filed February 20, 1980, before the Texas Supreme Court, Appellants raised a federal question for the first time. It is the position of Appellees that the raising of this question was not timely and that this Court has no jurisdiction to hear this Appeal.

The Appellants admit that as a general rule the raising of a federal question in such a Motion for Reconsideration is not timely for purposes of establishing jurisdiction for an Appeal. *Herndon v. Georgia,* 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935). Appellants have urged that this Appeal, however, is retrieved from the application of this general rule by an exception: that the question may be raised at a Motion for Rehearing when (1) the ruling giving rise to the federal question was unexpected and (2) the federal question was raised at the first opportunity following the new ruling. *Herndon v. Georgia, supra.* Appellants, however, do not meet either of the elements of the exception.

The holding of the Court of Civil Appeals (that Article 970a provides the only procedure by which a home rule city may disannex territory) which Appellants claim gives rise to a federal question, was not unexpected.

In *Herndon v. Georgia* this Court considered whether the ruling of the trial court could have been anticipated. 295 U.S. at 444. One of the ways this Court found that such a ruling could be anticipated is through rulings in other, similar cases.

In this case there was such a ruling and the Appellants should have anticipated its application to their case. The

Trial Court signed its findings of fact and conclusions of law on October 26, 1978. Less than two weeks before, on September 28, 1978 the Court of Civil Appeals for the First Judicial District of Texas held in *City of Hitchcock v. Longmire,* 572 S.W.2d 122 (Tex. Civ. App.—Houston (1st Dist.) 1978, writ ref'd n.r.e.), a case involving a referendum election on an annexation ordinance and the same statutes, that:

> Under Articles 970a and 1175(2), the governing body of the city does not have the right to repeal an annexation ordinance or *to adopt a disannexation ordinance without following the specific procedural requirements established in Art. 970a; a popular referendum would be subject to the same limitation.* 572 S.W.2d 122, 127. (emphasis added).

Based on this ruling the Appellants should have anticipated that in this case a similar ruling was probable and that they needed to urge the inherent federal question at the first opportunity before the Courts of Texas.

In this case the first opportunity for raising the question was *not* at the Motion for Reconsideration before the Texas Supreme Court. The first opportunity was in the Trial Court, almost two years ago. (C.L.-14, page 15a, Appellants' Jurisdictional Statement). Under the Texas Rules of Civil Procedure the Appellants were presented with many effective opportunities to raise a federal question once the ruling in *City of Hitchcock v. Longmire* was announced.

The Appellants' first opportunity to raise the federal question was at the Trial Court on a Motion for New Trial. Rule 324, TEX. R. CIV. P. Thereafter, the Appellants were able to raise the question on appeal to the

Court of Civil Appeals. Rule 418, TEX R. CIV. P. After the Court of Civil Appeals ruling the Appellants had an opportunity to raise the question on a Motion for Rehearing. Rule 458, TEX R. CIV. P. The Appellants then had an opportunity to raise the federal question on an application for writ of error under Rule 469, Subparagraph (e) of the TEX. R. CIV. P. The failure to raise the federal question at the Trial Court or at the Court of Civil Appeals made it impossible for the Texas Supreme Court to consider the point under the Texas Rules of Civil Procedure. *Harris v. Windsor,* 156 Tex. 324, 294 S.W.2d 798 (1956); *Aetna Life Insurance Co. v. Wells,* 566 S.W.2d 900 (Tex. 1978), Rule 469, TEX R. CIV. P.

To explain their failure to raise a federal question at any of these points, Appellants urge the reasoning of Justice Cardozo's dissent in *Herndon v. Georgia.* It is their claim that it was not necessary to concede the Court of Civil Appeals' position before the Texas Supreme Court and urge the constitutional invalidity of the procedure under the Fourteenth Amendment to the Constitution.[1] The holding of *Herndon v. Georgia* does not support this contention. The Appellants were under a duty to raise the question at the first opportunity after their constitutional rights were invaded by the Trial Court's ruling. *Herndon v. Georgia, supra.*

It is a matter of longstanding Texas law that the Texas Supreme Court may adjudicate a statute to be unconstitutional when its invalidity is obvious and apparent. *Smith v. Decker,* 158 Tex. 416, 312 S.W.2d 632 (1958). It

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1. Appellants may, under Rule 48, TEX R. CIV. P. plead alternatively, hypothetically or inconsistently. By so pleading they could have hypothetically assumed the correctness of statutory construction of the Court of Civil Appeals and urged the federal question without compromising any portions of their appeal.

will do so, however, only when it is necessary to a decision of a case. *Gohlman, Lester & Co. v. Whittle,* 115 Tex. 9, 273 S.W. 806 (1925). As a matter of Texas law, the Motion for Reconsideration could properly be before the Texas Supreme Court if the assigned validity was obvious, apparent and its determination was necessary to a decision on the case. See Greenhill, *Presentation of a case to the Supreme Court of Texas,* 38 Tex. L. Rev. 538 (1960).

Appellants however, did not avail themselves of this further opportunity at the Texas Supreme Court, and thus avoided all the opportunities provided by Texas law to raise the federal question. (See pps. 25a and 26a of Jurisdictional Statement).

Moreover, Justice Cardozo's dissent is inapplicable to Appellants' situation. In *Herndon v. Georgia,* Justice Cardozo urged that the defendant, Herndon, came to the Georgia Supreme Court "without notice that the statute defining his offense was to be given a new meaning." 295 U.S. at 452. Appellants at the Trial Court level were clearly on notice of the construction given the statute in *Hitchcock v. Longmire, supra.*

Thus, Appellants had many opportunities under Texas procedure to point out the federal question(s) they now claim were inherent in such construction prior to their Motion for Reconsideration before the Texas Supreme Court. On the facts of this case, Appellants' assertion that the holding was unexpected is without merit. They failed to raise the federal question at the first opportunity that they had notice of such a possible holding. This Appeal should be dismissed because of the Appellants' failure to bring this case under either element of the exception to the general rule.

THERE IS AN ADEQUATE NON-FEDERAL BASIS FOR THE DECISION BELOW

An examination of the Court of Civil Appeals' judgment and opinion will show that this case was decided entirely on the basis of Texas law.

The decision was based solely on Texas law related to initiative elections. The basis of the decision of the Court of Civil Appeals is the application of the leading Texas case, *Glass v. Smith,* 150 Tex. 632, 244 S.W.2d 645 (1951). This case holds that in order to demonstrate a legal right to a writ of mandamus ordering the City Council to hold a City Charter initiative election the petitioners must show that the subject matter of the initiative ordinance has not been withdrawn from the field in which the initiatory process is operative. Applying *Glass v. Smith,* the Court of Civil Appeals held, as a matter of state law, that Article 970a, together with Article 1175, restrict and condition the City's power to disannex in such a complete, comprehensive manner, thus excluding the exercise of such power in any other way, including by means of an initiative ordinance. On these grounds the Appellants were denied a writ of mandamus ordering the holding of an initiative election. On these grounds alone the rights of Appellants were determined; they constitute and provide an adequate, broad non-federal ground for the decision. *Hale v. Akers,* 132 U.S. 554, 10 S.Ct. 171, 33 L.Ed. 442 (1889).

It is important to note that the Court of Civil Appeals did not consider Article 970a as being applicable to the Appellants in this case, only that as a matter of Texas law the existence of Section 10 of Article 970a has the effect of restricting the City Council's power to disannex

to its specific procedures contained within that statute. By its terms, Article 970a could not be applicable to the area sought to be disannexed until three years had elapsed from the date of its annexation. It provides further that no right of disannexation is available if certain tax supported bonds have been sold to finance improvements in the annexed area and such bonds are outstanding (p. 5, Jurisdictional Statement). In the case of the territory involved in this case, such bonds have been sold, and improvements have been made. (FF-28, p. 6a-7a of Jurisdictional Statement).

Appellants made no attempt to comply with any of the provisions of Article 970a. Nevertheless, Appellants cite *Staub v. Baxley,* 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958) to excuse their noncompliance. A distinction between that case and this is whether Appellants have challenged the constitutionality of all of Article 970a, or only a part of it.

In *Staub v. Baxley, supra* the ordinance established a licensing scheme and its several sections were interdependent. 355 U.S. 323. Here the Appellants challenge apparently only the petition procedure.[2] All other portions not related to the petition procedure remain unchallenged. *Staub v. Baxley* therefore cannot excuse Appellants noncompliance with unchallenged portions of Section 10 of Article 970a.

The Texas decision is based solely on the application of established common law of Texas found in *Glass v. Smith, supra* and *Longmire v. City of Hitchcock, supra.*

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2. In the event of judicial invalidation, Article 970a is severable. Acts 58 Leg. R.S. 1963 ch. 160, Article IV p. 454 (p. A-5 of Appendix).

There is no federal question necessary to the determination of the case. It was not necessary to rule that Article 970a was valid against a constitutional challenge to determine this case. *Honeyman v. Hanan,* 300 U.S. 14, 57 S.Ct. 350, 81 L.Ed. 476 (1937).

The resolution of either of the Appellants' federal questions will not affect the determination of this case. In both questions, Appellants complain of Article 970a. Therefore it is useful to consider the outcome under Texas law if various portions of Article 970a are deleted. The provisions of Article 970a condition the exercise of the authority to disannex granted by Article 1175.

Article 1175 grants to home rule cities such as Houston ". . . the power to . . . provide for the disannexation of territory within such city . . . according to such rules as may be provided by said charter not inconsistent with the procedural rules prescribed by the Municipal Annexation Act."

Under the decision below, as long as there are procedural rules left in Article 970a there can be no disannexation by initiative ordinance.[3] Appellants have not attacked all of the provisions of Article 970a, with the result that the remaining procedures would survive by the terms of its "severability" provisions. (Acts 58th Leg. R.S. 1963, ch. 160, Article IV, p. 454, page A-5 of Appendix).

With these matters in mind, assume that all of the references to a petition by property owners were to be deleted from Article 970a. The remaining procedural

3. The Court of Civil Appeals held that an additional Texas statute Art. 1266 TEX REV. CIV. STAT. ANN. did not apply to the area in question (p. A-4 of Appendix).

rules as to the solicitation of the petition, the standards for the provision of city services, the time and the bonded indebtedness restrictions, as well as City Council and judicial review of the petition would remain. Appellants' failure to comply with these other rules bars annexation by initiative ordinance.

Further, assume that all references to a petition are deleted, a requirement that the annexing City provide comparable services within three years would remain and no right to disannexation would be available for as long as the annexing city had incurred and had outstanding general obligation bond debt. These procedures would again bar any disannexation by initiative ordinance.

Moreover, assume all of the disannexation provisions of Article 970a and Article 1175 were deleted, Article 1266 would deprive the City of its authority to disannex. *City of San Antonio v. State ex rel. Criner,* 270 S.W.2d 460 (Tex. Civ. App.—Austin, 1954, writ ref'd n.r.e.).

Only by deleting all of the disannexation provisions of Texas law would Appellants be without some procedure that would bar disannexation by initiative ordinance. However, the Appellants have not put all of the Texas statutes related to disannexation at issue, only questioning the petition procedure or the property ownership requirement, depending on which question is considered.

Underlying this result is a line of Texas cases that hold that where the Legislature expresses a procedure to be observed in exercising a particular municipal authority, no other procedures are to be added or deleted. *City of Hitchcock v. Longmire, supra. San Pedro North, Ltd. v. City of San Antonio,* 562 S.W.2d 260 (Tex. Civ. App. —San Antonio, 1978, writ ref'd n.r.e.); *Hancock v.*

Rouse, 437 S.W.2d 1 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.).

In summary, the Appellants did not challenge those disannexation provisions of the Texas statutes that would bar disannexation by initiative election. Their failure to do so means that there are wholly adequate, reasonable state grounds not in issue which are determinative of the outcome of the case.

Moreover, the decision of the Court of Civil Appeals construed the provision of the Charter of the City of Houston related to initiative elections. The legal rights that Appellants sought to protect were those granted by the provisions of Article VIIb of the Charter (Page A-6 of Appendix). The Court of Civil Appeals construed those provisions and found that by expressly providing a procedure for disannexation in Article 970a, the Legislature of Texas had withdrawn the matter from the Charter initiative process and foreclosed disannexation by initiative ordinance.

The Court of Civil Appeals did not decide any federal question in the process of interpreting Appellants' rights under the Charter and Texas common law. Those rights were construed in light of Article 970a, but there was no decision on the validity of such Article under the Federal Constitution or statutes. There is, as a consequence, no jurisdiction over this case in this Court. *Commercial Bank of Cincinnati v. Buckingham's Executors,* 46 U.S. (5 How.) 317, 12 L.Ed. 169 (1847); *Honeyman v. Hanan, supra.*

There is no decision on a federal question necessary to the determination of this case. The state law basis for the

decision is clear, and the resolution of either of the federal questions offered by Appellants would not determine the outcome of the case. The appeal should be dismissed.

THE FEDERAL QUESTION OR QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The federal question raised at the Texas Supreme Court was that the Court of Civil Appeals had, by its interpretation of Article 970a, imposed a property ownership restriction on the right of persons to vote on the question of adopting an initiated disannexation ordinance. The Appellants cited *Hill v. Stone,* 421 U.S. 289, 95 S.Ct. 167, 44 L.Ed.2d 172, reh. den'd. 422 U.S. 1029, 95 S.Ct. 2617, 45 L.Ed.2d 686 (1975). In support of the question raised before this Court, Appellants have cited *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969), *Harper v. Virginia Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *Phoenix v. Kolodziejski,* 399 U.S. 204, 90 S.Ct. 1990, 16 L.Ed.2d 523 (1970) and *Cipriano v. City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969). In all of these this Court found that the requirement of property ownership qualification on the right to vote was not justified by any compelling state interest.

However, in this case there will be no election; and therefore the federal question raised at the Texas Supreme Court clearly misapprehended the holding of the Court of Civil Appeals. The ruling of the Court of Civil Appeals foreclosed an initiative election, and therefore there was no possibility that the voting rights of any

person would be affected. This ruling did not infringe on any federal right of Appellants. This Court, in *Hunter v. City of Pittsburgh,* 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907), held that the question of citizen consent to the expansion or contraction of municipal boundaries was a matter of state law, and that such actions could be accomplished without an election or the consent of the persons affected.

The federal question presented on Motion for Reconsideration in the Texas Supreme Court was unrelated to the holding of the Court of Civil Appeals. The lower court decision had, by its terms, excluded the constitutional question raised at the Texas Supreme Court, and therefore the federal question was insubstantial and irrelevant to the decision of that Court.

Appellants have proposed a new question in their Jurisdictional Statement filed with this Court (p. 3). Appellees again point out that Appellants may not raise such issues for the first time before this Court. *Cardinale v. Louisiana, supra.* Without waiving this objection, Appellees would urge that this second question is also insubstantial and unrelated to the decisions of the Texas Courts below.

The right to petition is one of the group of cognate or kindred rights of the First Amendment. *DeJonge v. State of Oregon,* 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937). Appellants have, in their Jurisdictional Statement, attempted to analogize this First Amendment right in the same manner as the voting rights cases decided by this Court under the Fourteenth Amendment. The analogy fails because of the nature of the right that Appellants are seeking to vindicate.

This Court has differentiated between the right to petition and the right to vote on the basis of the origin of such rights by holding that there is no constitutional right to vote in state elections. *Harper v. Virginia Bd. of Elections, supra.* The Court has long held that the exercise of the political franchise of voting was a fundamental political right, because it is preservative of all rights. *Harper v. Virginia Bd. of Elections,* citing *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

Restrictions on state voting rights are therefore subject to strict scrutiny and this Court has struck down certain restrictions as unrelated to any permissible state interest. *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In particular, the cases cited by Appellants are related to this Court's invalidation of property ownership as a voting qualification in school board and bond elections. *Kramer v. Union Free School District No. 15, supra; Phoenix v. Kolodziesjski, supra; Cipriano v. City of Houma, supra.*

The cases that this Court has decided on the right to petition apply a different analysis, one based on the substantially different constitutional origin of such right. In *Schneider v. Smith,* 390 U.S. 17, 88 S.Ct. 682, 19 L.Ed. 2d 799 (1968) this group of rights was held to create an "associational freedom" into which the government may not intrude. This Court looked to the character of the right, not the limitation imposed, in determining whether a statutory limitation impermissibly intruded into the matter of individual freedom protected by the First Amendment. *Thomas v. Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945). The character of the right the

Appellants seek to protect is *not* one of associational freedom, nor is it related directly or indirectly to the right to vote. The right claimed to be intruded upon in this case is "the right to disannex by public petition." (p. 10 of Jurisdiction Statement). This is neither a fundamental or personal right, but only a procedural right created by a statutory scheme governing the expansion or contraction of municipal boundaries, an area where no fundamental rights are at risk. *Hunter v. City of Pittsburgh, supra.*

The right that is claimed to be invaded is not of the same class or character of petition rights that this Court has previously held to be protected. In *N.A.A.C.P. v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 317 (1963) the legal activities of the N.A.A.C.P. were held to be forms of expression and association. The activity was found to be not mere litigation but rather represented political activity, protected under the First Amendment. This notion of group action inherent in *N.A.A.C.P. v. Button,* appears again in *United Mine Workers v. Illinois State Bar Asso.,* 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967) and *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed. 2d 339 (1971) in which this Court upheld, as an exercise of the right to petition, group action in retaining counsel to represent members in litigation.

In this case, the provisions of Article 970a related to petition do not intrude on any of the personal freedoms. No right to associate, to organize, or to retain counsel as a group is infringed by the procedural steps required by a statutory process for expanding or contracting municipal boundaries.

The petition procedure in question is part of a rational state procedure for regulating the expansion or contraction of city boundaries. In *Hunter v. City of Pittsburgh, supra,* this Court gave wide latitude to the states in regulating such matters. The provisions of Article 970a have a rational basis for the classification of property and non-property owners.

This basis is found in the history of Texas municipal annexation policy. For a long time the annexation power of a municipality in Texas was relatively unrestricted. See *State of Texas ex rel. Pan American Production Co. v. Texas City,* 157 450, 303 S.W.2d 780; (appeal dismissed) 355 U.S. 603, 78 S.Ct. 533, 2 L.Ed.2d 523 (1957). In general, prior to the enactment of Article 970a, if a Texas home rule city annexed territory it could not thereafter lawfully disannex that territory. *City of San Antonio v. State ex rel. Criner, supra.*

In 1963 the Texas legislature enacted procedural rules in the form of Article 970a, which included for the first time, a general procedure for disannexation. These procedures meet the important interests of citizens by striking a balance between the continuation of the benefits of city services (described in *City of San Antonio v. State ex rel. Criner, supra*) and providing a means of escape if those city services are not forthcoming within three years. Among the "persons" enjoying city services are entities which have no right to vote such as corporations, partnerships and other similar persons. Under Article 970a both groups of affected persons have a limited, collective right to remain within a city or to join in a disannexation petition. The provisions of Article 970a thus represent a balancing of those two groups' interests in city services

against City interests in stable municipal boundaries and capital investments.

This elaborate legislative scheme never affected Appellants, except abstractly, in their initiative petition litigation. Nevertheless, even in the abstract, the disannexation petition procedure requiring property owners to petition as well as voters represents a rational legislative classification. The interests in city services are not limited to voters, but are of equal concern to "persons" legally incapable of voting.

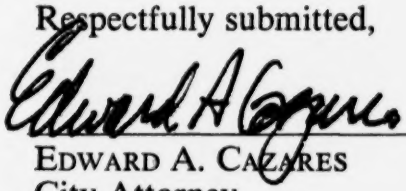
The question now presented by the Jurisdictional Statement is not related to any fundamental right that this Court has interpreted as being within the scope of the First Amendment. It is part of a state statutory procedure for the contraction of municipal boundaries, a matter that is left to the reasonable discretion of each state. *Hunter v. City of Pittsburgh, supra.* The State of Texas exercised its legislative discretion in a rational manner to protect the rights of voters, property owners and municipalities by the disannexation provisions of Article 970a. The question thus analyzed has been foreclosed by this Court, by its decision in *Hunter v. City of Pittsburgh, supra* and thus does not present a substantial federal question. *Equitable Life Assurance Soc'y. v. Brown,* 187 U.S. 308, 23 S.Ct. 123, 47 L.Ed. 190 (1902).

CONCLUSION

Appellants have not presented a question that was decided by the Texas Supreme Court. The appeal of the federal question raised before the Texas Supreme Court

was not filed in a timely manner. The determination of the cause below was based on wholly state grounds, and the questions now presented are not of a substantial nature. For these reasons the Appeal should be dismissed.

Respectfully submitted,



EDWARD A. CAZARES
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Houston, Texas 77001
713/222-5151

Attorney for City of Houston, Appellee

I, EDWARD A. CAZARES, City Attorney of the City of Houston, Texas, one of the Attorneys for the City of Houston, Texas, et al. Appellees, herein do certify, that on the 12th day of September, 1980, I served copies of Appellees' Motion to Dismiss on Appellants by mailing three copies in a duly addressed envelope, first class postage prepaid, to their attorney of record, Tom Leonard of Leonard, Koehn, Rose, Webb & Hurt, Suite 751, 2001 Bryan Tower, Dallas, Texas 75201 and further that all parties required to be served have been served.

Edward A. Cazares

EDWARD A. CAZARES

SUBSCRIBED AND SWORN before me in the City of Houston, Harris County, Texas.

Kathleen J. Montelongo

Notary Public in and for
Harris County, Texas

My commission expires:

7-2-81

APPENDIX

Constitutional Provisions

Fourteenth Amendment to the Constitution of the United States

Statutes

Article 970 a, Section 10
Art. 1175, Section 2
Art. 1266

Session Laws

Acts 58th Leg. R.S. 1963
Ch. 160 Art. III p. 454
Acts 58th Leg. R.S. 1963
Ch. 160 Art. IV, p. 454

Charter of the City of Houston

Article VIIb of Charter of City of Houston

Texas Rules of Civil Procedure

Rule 48
Rule 324
Rule 418
Rule 458
Rule 469
Rule 483

Fourteenth Amendment, United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 970a:

From and after the effective date of this Act, any city annexing a particular area shall within three (3) years of the effective date of such annexation provide or cause to be provided such area with governmental and proprietary services, the standard and scope of which are substantially equivalent to the standard and scope of governmental and proprietary services furnished by such city in other areas of such city which have characteristics of topography, patterns of land utilization, and population density similar to that of the particular area annexed. In the event a city fails or refuses to provide or cause to be provided such services within the time specified herein, a majority of the qualified voters residing within such particular annexed area and the owners of fifty percent (50%) or more of the land in such particular annexed area, which area must adjoin the outer boundaries of the city, may petition the governing body of such city to disannex such particular annexed area. Should the governing body of such city fail or refuse to disannex such particular annexed area within ninety (90) days after receipt of a

valid petition, any one or more of the signers of such petition may, within sixty (60) days of the date of such failure or refusal, file in a district court of the district in which such city is located an action requesting that the particular annexed area be disannexed. Upon the filing of an answer in such cause by the governing body of such city, and upon application of either party, the case shall be advanced and heard without further delay, all in accordance with the Texas Rules of Civil Procedure. Upon hearing of the case, if the district court finds that a valid petition was filed with the city, that the particular annexed area is otherwise eligible for disannexation under the provisions of this Section, and that the standard and scope of governmental and proprietary services provided or caused to be provided to such particular annexed area are not substantially equivalent to the standard and scope of governmental and proprietary services provided or caused to be provided other areas of such city having characteristics of topography, patterns of land utilization and population density similar to that of the particular annexed area, it shall enter an order disannexing such particular annexed area. Provided, however, that the right of disannexation provided for in this Section shall not be available to any particular annexed area which was lawfully within the city limits of a city at the time of the approval or sale of any general obligation bonds of the city if proceeds therefrom have been expended for capital improvements to serve such particular annexed area, so long as any such bonds are outstanding.

Article 1175.

Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among

the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty . . .

> 2. The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, to provide for the disannexation of territory within such city and to provide for the exchange of territory with other cities or towns, according to such rules as may be provided by said charter not inconsistent with the procedural rules prescribed by the Municipal Annexation Act. (Article 970a).

Art. 1266.

Whenever there exists within the corporate limits of any city in this state of four thousand (4,000) or more population according to the preceding Federal Census located in a county having a population according to such census in excess of two hundred and five thousand (205,000) territory to the extent of at least three (3) acres contiguous, unimproved and adjoining the lines of any such city, or wherever there exists within the corporate limits of any city in this state of five hundred and ninety-six thousand (596,000) or more population according to the last preceding Federal Census, improved territory which is non-taxable to the city and which is contiguous and adjoining the lines of any such city, the governing body of any such city, whether organized by Special Law, home rule charter, or General Laws of this state, may by ordinance duly passed discontinue said territory as a part of

any such city. When said ordinance has been duly passed, the governing body shall cause to be entered an order to that effect on the minutes or records of such city; and from and after the entry of such order, said territory shall cease to be a part of such city.

Article III:

Cumulative Clause. The provisions of this Act shall not repeal Chapter 231, Acts of the Fortieth Legislature, Regular Session, 1927, as last amended or any other law or part of law upon the subject of which the provisions of this Act relate unless they are expressly inconsistent and then only to the extent of such inconsistency. It is expressly provided that this Act shall not repeal or affect Article 1183 to Article 1187, both inclusive, Revised Civil Statutes of Texas, 1925, nor apply to any territories held by any city or town under the provisions of said Articles or the laws of which said Articles were a codification.

Article IV:

Severability. If any provisions of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

CHARTER OF THE CITY OF HOUSTON:

Article VIIb. Initiative and Referendum.

Sec. 1. General power.

The people of Houston, in addition to the method of legislation hereinbefore provided, shall have the power of direct legislation by the initiative and referendum.

Sec. 2. The initiative.

The initiative shall be exercised in the following manner:

(a) *Petition.* A petition signed and verified in the manner and form required for recall petition in Article VIa by qualified electors equal to 15 per cent of the total vote cast at the democratic primary for the nomination of Mayor and Commissioners, next preceding the filing of said petition, accompanied by the proposed legislation or measure in the form of a proposed ordinance or resolution be submitted to a vote of the people, if not passed by the Council, shall be filed with the Secretary.

(b) *Secretary's certificate.* Within five days after the filing of such petition the Secretary shall certify the number of votes cast at the democratic primary for nomination of Mayor and Commissioners, next preceding the filing of said petition, and the number of signers of such petition, and shall present said certificate, petition and proposed ordinance or resolution to the Council.

(c) *Action by the council upon petition.* If such petition be signed, as in the charter provided, by quali-

fied electors equal to 15 per cent of the total vote cast at the democratic primary for the nomination of Mayor and Commissioners next preceding the filing of such petition, the Council, within ten days after the receipt thereof, except as otherwise provided in this Charter, shall either pass such ordinance or resolution without alteration, or submit it to the popular vote at a special election, which must be held within thirty days after the date of the ordering thereof; provided, however, that if any other municipal election is to be held within sixty days after the filing of the petition said proposed ordinance or resolution shall be submitted without alteration to be voted upon at such election.

Rule 48. Alternative Claims for Relief

A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based upon legal or equitable grounds or both.

Rule 324. Prerequisites of Appeal

A Motion for new trial shall not be a prerequisite to the right to complain on appeal, in any jury or non-jury case. A motion for new trial may be filed by any party, however, and the omission of a point in such motion shall

not preclude the right to make the complaint on appeal. Notwithstanding the foregoing, it shall be necessary to file a motion for new trial in order to present a complaint which has not otherwise been ruled upon. A complaint that one or more of a jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact may be presented for the first time on appeal. When judgment is rendered non obstante veredicto or notwithstanding the finding of a jury on one or more special issues, the appellee may bring forward by cross-point contained in his brief filed in the Court of Civil Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of a jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel. The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof, save and except such grounds as require the taking of evidence in addition to that adduced upon the trial of the cause.

Amended by orders of March 31, 1941, effective Sept. 1, 1941; Sept. 20, 1941, effective Dec. 31, 1941; July 20, 1954, effective Jan. 1, 1955; March 19, 1957, effective Sept. 1, 1957; April 12, 1962, effective Sept. 1, 1962; July 11, 1977, effective Jan. 1, 1978.

Rule 418. Briefs: Contents

The brief for appellant should contain in the order here stated:

(a) Names of all Parties. A complete list of the names of all parties shall be listed on the first page of appellant's brief, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participation in the decision of the case.

(b) Index. The brief shall contain a subject index with page references where the discussion of each point relied upon may be found and also a list of authorities alphabetically arranged, together with reference to the pages of the brief where the same are cited.

(c) Statement of the Case. A short, plain statement of the nature of the case without argument. A resume of the pleadings or evidence is seldom necessary and should be avoided.

(d) Points of Error. A statement of the points upon which the appeal is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. Such points will be sufficient if they direct the attention of the court to the error relied upon.

(e) Brief of the Argument. A brief of the argument, presenting separately or grouped, if germane, the points relied upon for reversal, the argument to include (i) a fair, condensed statement of the facts pertinent to such points, with references to the pages in the record where

the same may be found; and (ii) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any charge given or refused, such charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the full substance of such evidence so admitted or rejected shall be set out with reference to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided.

(f) Prayer For Relief. The nature of the relief sought on appeal should be clearly stated.

Amended by order of March 31, 1941, effective Sept. 1, 1941; order of Sept. 20, 1941, effective Dec. 31, 1941; order of July 11, 1977, effective Jan. 1, 1978.

Rule 458. Motion and Second Motion for Rehearing

Any party desiring a rehearing of any matter determined by any Court of Civil Appeals may, within fifteen days after the date of rendition of the judgment or decision of the court, or the filing of the findings of fact and conclusions of law, whether such date be in the same or a succeeding term of said court, file with the clerk of said court his motion in writing for a rehearing thereof, in which the assignments of error relied upon for the rehearing shall be distinctly specified, and the name and residence of the counsel of the opposing party, if known, and if not known, then the name and residence of the opposing party as shown in the record. The party filing such motion shall deliver or mail to each opposing party, or his attorney of record, a true copy of such motion,

and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so, he shall accompany his motion with, or furnish to the clerk on his request, a sufficient number of duplicates or copies thereof for the clerk to use in complying with the provisions of Rule 460. Failure to supply such copies on request of the clerk may result in a dismissal of the motion.

If the Court of Civil Appeals hands down an opinion in connection with the overruling of a motion for rehearing, a further motion for rehearing may, if the losing party deems same necessary, be filed within fifteen days after such opinion is handed down and the above regulations and those of Rules 460 and 468 shall apply to it as though it were the first motion; but a further motion for rehearing shall not be made as a matter of right in any other case.

Any motion for rehearing may be amended as a matter of right any time before the expiration of the fifteen-day period allowed for filing it, and with leave of the court any time before its final disposition.

All motions and other matters filed in either the Supreme Court or the Court of Civil Appeals, and not finally disposed of at the end of the term, shall be automatically continued to the next succeeding term of court. Amended by order of Sept. 20, 1941, effective Dec. 31, 1941; order of June 16, 1943, effective Dec. 31, 1943; order of October 10, 1945, effective Feb. 1, 1946; order of Aug. 18, 1947, effective Dec. 31, 1947.

Rule 469. Requisites of Application

Applications for writs of error shall be as brief as possible. The respondent is urged to file a reply.

The application for writ of error shall be filed with the clerk of the Court of Civil Appeals. It shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." The application shall contain the following:

(a) Names of All Parties. A complete list of the names of all parties shall be listed on the first page of the application, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participation in the decision of the case.

(b) Index. The application shall contain at the front thereof a subject index with page references where the discussion of each point relied upon may be found and also a list of authorities alphabetically arranged, together with reference to the pages of the application where the same are cited.

(c) Statement of the Case. The application should contain a brief general statement of the nature of the suit, —for instance, whether it is a suit for damages, on a note, or in trespass to try title, and that the statement as contained in the opinion of the Court of Civil Appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the Court of Civil Appeals correctly states the nature and result of the suit, except in the following

particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(d) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the Court depends on a conflict of decisions under Subdivision 2 of Article 1728, the petition should merely state that the Supreme Court has jurisdiction under a particular subdivision of Article 1728. Example: "The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728." Where jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

(e) Points of Error. A statement of the points upon which the application is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. Whether the matter complained of originated in the trial court or in the Court of Civil Appeals, it must be assigned as error in the motion for rehearing filed in the latter court.

(f) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the Court of Civil Appeals will be considered with the

application, and statements therein, if accepted by counsel as correct, need not be repeated.

(g) Prayer For Relief. The nature of the relief sought by the application should be clearly stated.

(h) If any brief or application for writ of error is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.

Amended by order of March 31, 1941, effective September 1, 1941; order of September 20, 1941, effective December 31, 1941; order of April 12, 1962, effective Sept. 1, 1962; order of July 11, 1977, effective Jan. 1 1978.

Rule 483. Order on Application for Writ of Error

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation "Refused, No Reversible Error." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction."

In cases of conflict named in subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, as amended, the Supreme Court shall grant the application for writ of

error, unless it be in agreement with the decision of the Court of Civil Appeals in the case wherein the application is filed, in which event said Supreme Court shall so state in its order, with such explanatory remarks as may be deemed appropriate. In cases where the decision of the Court of Civil Appeals is in conflict with a previous opinion of the Supreme Court, is contrary to the Constitution, the statutes or these rules, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the Court of Civil Appeals, making, at the same time, such further orders as may be appropriate.

When, subsequent to the filing of an application for writ of error, it is made to appear that a cause or an appealable portion thereof is moot, the Supreme Court may, in its discretion and after notice to the parties, upon granting writ of error and without hearing argument with reference thereto, dismiss such cause or the appealable portion thereof without reference to the merits of the appeal.

Amended by order of Oct. 10, 1945, effective Feb. 1, 1946; order of July 20, 1954, effective Jan. 1, 1955; order of July 20, 1966, effective Jan. 1, 1967; order of Oct. 3, 1972, effective Feb. 1, 1973; order of July 22, 1975, effective Jan. 1, 1976.